STATE OF MICHIGAN

IN THE SUPREME COURT

TRI-COUNTY INTERNATIONAL TRUCKS, INC., a Michigan corporation and IDEALEASE OF FLINT, a Michigan corporation,

Plaintiffs/Appellants,

v

HILLS' PET NUTRITION, INC., a Michigan corporation,

Defendant/Appellee.
_____/

Supreme Court Docket No.

Lenawee County Circuit Court
Case No. 02-986-CK

Court of Appeals Docket
No. 255695

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PLAINTIFFS/APPELLEES' RESPONSE TO DEFENDANT/ APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

LAW OFFICES
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PAGE(S)

III.

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ROYAL OAK, MICHIGAN 48067

(248) 548-4747

INDEX OF AUTHORITIES

PAGE(S)

Cases

Statutes

LAW OFFICES
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STATEMENT ON THE BASIS OF JURISDICTION

Defendant/Appellant's Statement on the Basis of Jurisdiction is satisfactory.

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STATEMENT OF QUESTIONS PRESENTED

Defendant/Appellant's argue more issues that those listed.

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STATEMENT OF STANDARD OF REVIEW

The Standard of Review as presented by Defendant/Appellant is not objectionable to the Plaintiffs/Appellees.

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INTRODUCTION

This is a case of what the words mean. The law to be applied is that of contract interpretation. This is not a Supreme Court case.

Perspective is important. The primary contract in this case was negotiated and signed in 1992. It was being used in 2001 when this accident occurred and, it is still being used today. It was settled with insurance money. Defendant/Appellant wants it to mean something new. These contracts had a life; they formed the basis of a successful business relationship. The Court of Appeals strictly construed the language of the contracts to support its conclusions. It did so in order to respect the intent of the parties. Defendant/Appellant will ask you to ignore the language of the contracts. It is an inherently weak position.

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REASONS WHY LEAVE SHOULD NOT BE GRANTED

This case employs standard rules of contract construction, nothing more. In order for Defendant/Appellant to obtain leave to appeal it must demonstrate that one or more the grounds found in MCR 7.302(B) have been met. It submits the Michigan Supreme Court has not written on contractual indemnity since 1985 although there have been 200 Appeals Court decisions dealing with that issue. (Defendant/Appellant's Brief, Pg. viii). To the Plaintiffs/Appellees' way of thinking this means the Michigan Supreme Court has not seen the need to review the status of the law. What is it that Defendant/Appellant presents that makes this case "special" to the extent it requires Supreme Court review when [we may presume] the Supreme Court has not found it necessary to review the issue since 1985? The answer is "nothing." It's Brief merely argues the Court of Appeals misinterpreted the words of the contract. Most of this argument, incidentally, is contained in what is represented to be the "Statement of Facts".

I am not a great writer and I hesitate to find fault with others but Defendant/Appellant's Brief in support of leave contains misstatements of the record. The Statement of Facts is argumentative. I feel compelled to go through the Statement of Facts on a heading-by-heading basis to correct the record although I will try not to get bogged down in it.

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PAGE(S)

III.

LAW OFFICES
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(248) 548-4747

INDEX OF AUTHORITIES

PAGE(S)

Cases

Statutes

LAW OFFICES
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COUNTER STATEMENT OF FACTS

Preliminary Statement of the Plaintiffs/Appellees Regarding the Contracts

There are two (2) Agreements involved in this case. They are coordinated and both intended to be given meaning according to William Kennedy in his deposition (Exhibit "A") at pages 39 and 40. The National Agreement was signed in 1992 and is Defendant/Appellant's Exhibit "E". It contains some attachments. Schedule A's are attached and designate who are authorized members. There is also an "ADDENDUM" which has little bearing on this case although Defendant/Appellant thinks otherwise. It is Exhibit "F" of Defendant/Appellant's Brief.

The National Agreement was a negotiated document between the parties. (Kennedy Dep., pgs. 8 and 9, Ex. "A"). Its purpose was to formalize the relationship of the parties (Kennedy Dep., pg. 10, Ex. "A"). The words of the contract establish its intention. The signatories are Hills', Division of Colgate Palmolive Company and Idealease Services, Inc., an Illinois corporation. The idea was that Hills' was going to lease trucks and trailers at a National rate from the Lessor. The Schedule A's on Exhibit "E" of Defendant/Appellant's Brief describe the vehicles and the rates. Although Idealease Services, Inc. is the Lessor, it was not going to provide the vehicles. Paragraph M of Exhibit "E" of Defendant/Appellant's Brief clearly says that the Lessor is going to contract with its local owners to do this. One of the Local owners was Idealease of Flint, Inc. Plaintiff/Appellee operates a truck rental business to the general public as part of its operation and provides trucks to designated Hills' Pet factories and warehouses in its area. (Todd Fracalossi Deposition, pg. 16, attached as Exhibit "B").

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It charges a current rate for vehicles leased to the public which is higher than the National rate negotiated in the 1992 Agreement. (Todd Fracalossi Dep., pgs. 11 and 12, Exhibit "B") Ordinary maintenance is to be provided as part of the rental (Exhibit "E", paragraph 4 of Defendant/Appellant's Brief). The repairs to the vehicles are to be performed by "authorized members or other parties authorized by Lessor." (Exhibit "E", paragraph 5 C of Defendant/Appellant's Brief). In this case, Tri-County, a corporation owned by the same corporation that owns Idealease of Flint, Inc provided the service for the trucks provided to Hills' by Idealease of Flint, Inc. (Todd Fracalossi Dep., pg. 16, Ex. "B")

If a vehicle is involved in an accident, different rules apply than for ordinary maintenance. In the event of an accident involving a vehicle in Hills possession, a substitute will be provided by Idealease of Flint, Inc. (Exhibit "E", paragraph 4F of Defendant/Appellant's Brief). Hills' must actually rent the substitute as would anyone else and pay the current rate for the vehicle. In addition it must still pay for the truck it wrecked at the National rate while it is in for repair. (Exhibit "E", paragraph 4F of Defendant/Appellant's Brief). The terms for the rental are contained on a separate contract called "RENTAL AGREEMENT AND INVOICE". It is Exhibit "M" of Defendant/Appellant's Brief. (Dan Murphy Deposition, pgs. 24, 25 and 35, attached as Exhibit "C").

The chain of events began with an accident to a truck in Hills' possession. (Motion for Summary Disposition of April 23, 2004, Transcript pg. 22, attached as Exhibit "D"). A substitute was towed with the "RENTAL AGREEMENT AND

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INVOICE" on the seat of the truck (Tressa Hornock Deposition, pg. 36, attached as Exhibit "E"). Exhibit "M" of Defendant/Appellant's Brief is a xerox copy and it dated December 19, 2000. It clearly shows the insurance information for Hills' on the left column. The current rate being charged is in the right column. The top clearly says Hills' is renting a truck. The problem is that no one, neither Plaintiffs/Appellants nor Defendant/Appellee, can honestly say whose scribble is on the bottom of the Agreement. Plaintiffs/Appellants argue it does not matter. The custom of these companies did not require a signature. I have attached several of these Agreements as Exhibit "F" made before the date of this Agreement which were not signed at all. Hills' still took the vehicle, used the vehicle, returned the vehicle and then paid the rate on the face of the document. In this case, it paid the rate on Exhibit "M" of Defendant/Appellant's Brief.

Bruce Head was injured in an auto accident on January 4, 2001 involving the truck referenced in Exhibit "M" of Defendant/Appellant's Brief. He sued Tri-County and Idealease of Flint, Inc. A request for indemnity was made by both to Hills'. Indemnity was not provided. A demand for insurance coverage was made to Hills' insurance carrier, Travelers Property Casualty Company. It took the position it was excess to any other insurance that Tri-County and Idealease have. In fairness, Travelers did provide money for defense and participate in the settlement but it has demanded repayment. The demands by Tri- County and Idealease of Flint, Inc were made pursuant to the terms of the National Agreement (Exhibit "E" of Defendant/Appellant's Brief) and the RENTAL AGREEMENT AND INVOICE (Exhibit "M" of Defendant/Appellant's Brief).

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This case was started in order to sort out the breach of contract claims alleged by Tri-County against Hills'. The Trial Court denied Plaintiffs/Appellees' relief but the Court of Appeals in the Opinion attached as Exhibit "A" to Defendant/Appellant's Brief reversed saying Hills' owed indemnity to both Idealease of Flint, Inc. and Tri-County and that it had breached its duty to provide insurance to Idealease of Flint (although not to Tri-County).

I will now address the various sections of Defendant/Appellant's Statement of Facts. I am not going to address each and every statement but that doesn't necessarily mean I agree with what was said.

Background and Overview

Plaintiffs/Appellees submit this addition.

The vehicle was "red tagged" because the cotter key that held the lock nut on the steering arm was removed while the truck was in for recall repairs (which were not finished). It was dangerous. Tri-County did not remove the red tag. An employee of Idealease of Flint testified she spoke to an employee of Tri-County who she could not identify and was told, according to her testimony, that she could remove the red tag and release the truck. She did so. (Tressa Hornock Dep., page 35, attached as Exhibit "E").

The Corporate Entities and the Contracts Involved

Plaintiffs/Appellees submit this addition.

Idealease of North America and its subsidiary, Idealease Services, Inc ("Lessor" in the 1992 agreement) are Illinois corporations. Idealease of Flint, Inc and Tri- County

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are Michigan corporations. (Exhibit "E", first paragraph of Defendant/Appellant's Brief).

This following statement made on page 2 of Defendant/Appellant's Statement of Facts is wrong:

> "The Court of Appeals' panel agreed with Hills' Pet that the Rental Agreement had no power to bind Hills' Pet. The plaintiffs were unable to show who signed the Rental Agreement and Idealease of Flint could not show that the unidentified person had any authority to bind Hills' Pet. (Emphasis provided)

The Court of Appeals actually said on page 5:

> "Accordingly there is evidence presented on both sides of the issue regarding whether defendant executed the rental agreement. In our view, there is a question of fact on the issue of whether defendant, through an authorized representative, executed the rental agreement or otherwise assented to it by accepting the truck and paying for it." (Emphasis provided)

This means if this case is not otherwise resolved there will be a trial on this issue.

Brian (sic) Head's Negligence Lawsuit against Tri-County and Idealease of Flint

Defendant/Appellant's tacit assertion that Tri-County and Idealease of Flint, Inc. were the only responsible parties is incorrect. Comparative negligence was plead against Plaintiff (Answer to Complaint) and a Notice of Non-Party at Fault was filed against Hills' Pet, who was Bruce Head's employer. The accident occurred almost three (3) weeks after the truck was released. The employer, Hills' was responsible under State law for the safe condition of the truck and was required to have it inspected each

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day. The checklist required visualization of the very part that failed. It did not perform this inspection.

Although each of the Hills' drivers had, under State and Federal law, the duty to inspect the vehicle and fill out a checklist (which included this very nut) before each trip, no one did so, not even Bruce Head. (Deposition of Brian Sweet, pgs. 42-44, attached as Exhibit "G"). Worse, the truck demonstrated steering problems during the trip immediately preceding the trip in which the accident occurred but that driver (it was not Bruce Head) did not report this deficiency in the manner required by company policy. (See Exhibit "G", pgs. 21 and 24). These factors were claimed as defenses and/or partial defenses by the defendants in the injury suit. They filed a Notice of Non-Party at Fault against Hills', otherwise exempt because of the worker's compensation exclusive remedy provision. Claims of comparative negligence and/or intervening negligence were made against Bruce Head as well.

The 1992 National Agreement drafted by Idealease, its negotiated Addendum Modifying the core indemnity term, and the circumstances surrounding the negotiation of the contract

Defendant/Appellant suggests that William Kennedy testified that the 1992 National Agreement was the only one that would apply to the vehicle involved in this accident on page 4 of its Brief where it stated "Idealease's president testified that he would not 'ever expect that a truck would be given to Hills,' in particular, without it being subject to the terms of [the National Agreement]." Again, this is incorrect. William Kennedy testified just the opposite. He said there was another contract that

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applied to this vehicle. William Kennedy testified at his deposition on pages 9 and 10 (Ex. "A") as follows:

> "Q. What was the intent of this agreement? [1992 agreement]
>
> A. To put in place a document that would document our relationship.
>
> Q. Okay. And that relationship was what?
>
> A. We would provide equipment and maintenance, and they reimburse us for the fees and costs.
>
> Q. Was it to include all of the vehicles that Hill's Pet operates, if you know?
>
> A. No. It did not include all of them.
>
> Q. What vehicles were excluded?
>
> A. They had an – if I remember right, at that time, they had a plant that didn't come under this agreement." (Emphasis provided)

On page 5 of its Brief, Defendant/Appellant states:

> "Schedule B modifies the indemnity term [in the 1992 agreement] to exclude indemnity for Idealease and its members' and owners 'direct responsibility or negligence'." (Emphasis provided).

It expands this statement on page 5 and states:

> "But Paragraph 10 of the National Agreement was amended (contemporaneously with its signing) by Schedule B to *exclude* indemnity whenever (as here) the liability is on account of the wannabe indemnitees' 'direct responsibility or negligence.'" (Emphasis in text).

This statements are erroneous. Schedule B limits the liability only for the "lessor" not for "owner, Idealease, Inc. or authorized members." This is easily proven.

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Exhibit "E" of Defendant/Appellant's Brief contains the 1992 Agreement. It states on page 1 at the very top:

> "THIS AGREEMENT is made this 21st day of February, 1992, between Idealease Services, Inc., an Illinois corporation. ('Lessor') . . ."

The "ADDENDUM TO MASTER AGREEMENT DATED 2/21/92, likewise attached, as Exhibit "E" 1 of Defendant/Appellant's Brief, continues the language of section 10 of the original text (which says that Hills' shall indemnify "Lessor, Owner, Idealease, Inc. and all Authorized Members" for all claims) by adding "Unless such action is proved to be the direct responsibility or negligence of the Lessor . . ." This means Idealease Services Inc., not Idealease of Flint, Inc. or Tri-County nor under any circumstances can it be said to apply to "owner, Idealease, Inc. or authorized members." It cannot be read any other way. The Court of Appeals read the contract and came to the same conclusion at page 2:

> "'Lessor' appears in both the national agreement and addendum. The 'Lessor' is identified in the first lines of the national agreement as Idealease Services, Inc. Thus, the term 'Lessor,' when used in either location, must refer to Idealease Services, Inc., Defendant admits in its brief that 'Idealease Services, Inc was the "Lessor."' The term 'Lessor' must mean the same thing when it appears in the national agreement as when it appears in the addendum to the national agreement, because the language of a contract must be given its plain and ordinary meaning. (Citing cases). Therefore, where the addendum excludes indemnity for the 'direct responsibility or negligence of the Lessor,' it does not except negligence for the negligence of plaintiff Tri-County." (Emphasis provided)

On page 6 of Defendant/Appellant's presentation it quotes certain testimony of William Kennedy to support its contention that Tri-County was not an "authorized member" as defined in the 1992 Agreement. It says:

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> "The Court of Appeals decided, as a matter of law, that Tri-County was an 'Authorized Member' entitled to indemnity under the National Agreement's core indemnity terms. But the record clearly shows that Tri-County . . . was not an 'Authorized Member' as to the vehicle Head was driving."

Defendant/Appellant then confuses "Authorized Member" with the words "member" and "Stockholder" without saying why they are the same:

> "As the Idealease parent company's president testified, *every,* 'member' is a stockholder in Idealease of North America, the Idealease parent company." (page 6 of Brief; Emphasis in text).

I'm not sure this proves anything. Its kind of a "beat around the bush" way of making a point. There certainly is specific evidence that Tri-County was an authorized member. Dan Murphy, the Executive Vice President of Idealease, Inc. testified at pages 51 and 52 (Ex. "C") of his deposition regarding the exact question whether Tri-County was an "authorized member" in the corporate eyes of Idealease, Inc.

> "Q. Do you know whether or not Tri-County was ever designated an authorized member for any purpose under this contract which is Exhibit 1? [1992 Agreement was Exhibit 1].
>
> A. Under here?
>
> Q. Yeah.
>
> A. Yeah.
>
> Q. Do you agree that it is an authorized member for purposes of that contract?
>
> A. That it is?
>
> Q. Yes.
>
> A. Yes."

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One of the Schedule A's lists Tri-County as an authorized member. It is attached as Exhibit "H". It was relied upon by the Court of Appeals as part of its findings.

The 2000 Rental Agreement

I defer to the discussion I made in the first section entitled **Background and Overview.**

The Insurance Procurement Terms

Defendant/Appellant begins " The Rental Agreement terms do not matter now, since the Court of Appeals held that 'contract' unenforceable." This is incorrect. The Court of Appeals actually held there was a question of fact whether it is enforceable. See my discussion in the section entitled: **The Corporate Entities and the Contracts Involved.**

The insurer for Hills' claims it is excess to any insurance that Tri-County or Idealease of Flint, Inc. carries and therefore, it does not have to pay anything on the indemnity until that insurance is exhausted. The insurer for Hills' is not the Defendant/Appellant in this case, Hills' Pet is. The reason is simple. Hills' Pet promised both Idealease of Flint, Inc. and Tri-County two distinct things as it pertains to this contract[s]. First it would indemnify and hold them harmless. Second it would buy insurance to cover them for this indemnification. When the demand was made, Hills' did not indemnify. When a claim for insurance was made, Hills' insurer did not provide coverage.

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The Summary Disposition Motions and the Trial Court's Rulings

Judge Pickard, the Trial Judge did not do well in his decision. Only one of his findings was confirmed by the Michigan Court of Appeals (Hills' did not breach its contract in failing to provide insurance to Tri-County). The assertions made in this section by Defendant/Appellant were answered by Plaintiffs/Appellees in pages 10 through 15 its Brief on Appeal which I have attached as Exhibit "I". It is still my position and the Court of Appeals accepted it. Since we are dealing with the Opinion of the Michigan Court of Appeals in this request for leave, I will, in the interest of brevity, direct my present attention to that.

The Court of Appeals Opinion: The majority say Hills' Pet loses on both indemnity claims and Idealease's claim of breach of the insurance term but not on Tri-County's claim of breach of the insurance term. Judge Zahra says Hills' Pet wins it all as to Tri-County.

Each of the Plaintiffs/Appellees make the same two claims albeit for different reasons. The first is that Hills' owes them indemnity. The second is that it failed to provide insurance coverage as agreed. If Idealease of Flint, Inc. succeeds in either then Hills' Pet will have to pay for its contribution to the settlement of the Head suit. The same can be said for Tri-County.

The discussion about Judge Zahra's dissent does not capture the flavor of his objection. He said on page 2 that just because you were once an "authorized member" it did not necessarily mean you are always an "authorized member." This really did not fit with the facts very well. The fact that Tri-County was named on Schedule A as an "authorized member" combined with Dan Murphy's testimony that Tri-County was an "authorized member" on December 11, 2003 certainly leads to the inescapable

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conclusion that it was an "authorized member" on the date of the accident. There is no evidence that Tri-County was ever not an "authorized member".

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ARGUMENT

I.

TRI-COUNTY INTERNATIONAL TRUCKS, INC. WAS DEFINITELY A "AUTHORIZED MEMBER".

The words in the contract are to be interpreted in accordance with their ordinary meaning. *Wausau v Ajax Paving, 256 Mich 646; 671 NW2d 539 (2003) and Reed v Reed, 265 Mich App 131; 693 NW2d 825 (2005).* This very basic contract interpretation rule is all that need to be applied in order to find Tri-County is a "authorized member". In the last section of the Statement of Facts I address Judge Zahra's contention to the effect that just because a party is a "authorized member" at one time does not mean that it will necessarily be a "authorized member" for all time. I reiterate my position that there is no proof that Tri-County was ever not a "authorized member" while there is substantial proof that it always was.

The second prong of Judge Zahra's objection is based upon this statement found on page 2:

> "The plain language of this document indicates that Tri-County's authorized membership is limited to the five vehicles identified in Schedule A. Because the accident giving rise to Tri-County's claim of indemnification did not involve one of the five vehicles identified in the 1994 Schedule A, Tri-County was not by definition, an Authorized Member."

In making this determination, Judge Zahra pays no attention to the dictionary meaning of the word "all". In the opinion of the majority in the Court of Appeals it relied upon the specific language found in the indemnification language of the 1992 Lease Agreement quoted on page 1 of that Opinion which states that:

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"Customer agrees to indemnify and hold Lessor Owner IDEALEASE, INC. and *all* Authorized Members harmless from and against . . . " (Emphasis supplied)

The Court of Appeals correctly held that the word "all" includes Tri-County as an "authorized member" whether or not its participation as a "authorized member" was limited to those vehicles. That is because of the dictionary definition of the word "all". The dictionary I have in my office is *The American Heritage Dictionary, Second College Edition, 1976 Edition* and the first definition for the word "all" is "the total entity or extent of". When Judge Zahra places a qualifier that Tri-County is only an authorized member for the five trucks listed in the Schedule A, he has not paid attention to the totality quality of the word "all" which does not allow such a limitation.

The majority of the Court of Appeals read this contract literally which is the Michigan Supreme Court's preferred view for interpretation of legal documents and contracts. There is no reason to disrupt this finding.

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II.

HILLS' PET NUTRITION, INC. DID NOT PROCURE LIABILITY INSURANCE FOR THE BENEFIT OF IDEALEASE OF FLINT THAT THE CONTRACT CALLED FOR. TRAVELERS INSURANCE COMPANY HAS TAKEN THE POSITION THAT IT IS EXCESS TO ANY OTHER INSURANCE THAT IS AVAILABLE SPECIFICALLY VIOLATING THE PROVISIONS OF THE INSURANCE PURCHASE AGREEMENT.

Defendant/Appellant makes a very interesting statement in the first line of his Argument. It states: "Hills' Pet purchased auto liability insurance on the vehicle Head was driving at the time of the accident." The requirement to purchase this insurance is contained in the RENTAL AGREEMENT AND INVOICE which is Exhibit "M" and which Defendant/Appellant says it is not bound by because it was not properly signed. Yet it now maintains that it purchased the very insurance that is contained in that Agreement and that it met some sort of affirmative duty by virtue of the fact that it did. This is a totally inconsistent position as it pertains to the validity of that particular document and it is an admission against its argument in other sections.

Idealease of Flint was found to be entitled to insurance by virtue of the terms of the 1992 Agreement. The factual basis for this portion of the Court of Appeals' version were admissions in its Brief on Appeal, including:

1. Defendant/Appellee's concession that the National Agreement controlled the issues of Hills' duties owed to Idealease of Flint. (Pg. 5 of Court of Appeals Opinion).

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2. Since Defendant/Appellee conceded that the National Agreement controlled, Hills' cannot deny that the indemnification provision in the National Agreement applies to Idealease of Flint's claim. (Pg. 6 of Court of Appeals Opinion).

3. Hills' also admitted that Idealease of Flint was the 'owner' thereby leading to the undeniable conclusion that Idealease of Flint qualifies under owner or all authorized members and there is no evidence to the contrary. (Pg. 6 of Court of Appeals Opinion).

4. The concessions as stated above lead to the inevitable conclusion which is not really disputed by it that it had a duty to provide insurance under the terms of the National Agreement."

Therefore at the point that Travelers comes up with the notion that it is not going to provide primary coverage and the insurers for Tri-County and Hills start paying instead of Travelers, it is abundantly clear that Hills' Pet has breached its agreement. If Travelers is unfairly interpreting his insurance policy, it is Hills' problem, not the problem of Tri-County of Idealease. Hills' was the contracting party in the 1992 Agreement, not Travelers. Travelers was only a tool that Hills was to employ in order to comply with the terms of the contract in question.

Defendant/Appellant again resorts to the"ambiguous language" argument that it vaguely made in its original appeal. This party's presentation was deemed "abandoned" by the Court of Appeals for lack of sustainable authority. MCR 7.212 (See page 5 of the Opinion). It is improper for counsel to provide authorities under this theory without first addressing why it was not abandoned or why the Court of Appeals was in error when it determined that it was abandoned. Failing that, these arguments should be stricken.

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III.

THIS HEADING CONTAINS THE SAME CLASSIC MISSTATEMENT THAT HAS BEEN EMPLOYED BY THIS PARTY THROUGHOUT ITS BRIEF. DEFENDANT/APPELLANT'S STATEMENT THAT THE "INDEMNITY TERM WAS AMENDED BY SCHEDULE B TO SAY THAT HILLS' PET WOULD NOT INDEMNIFY FOR THE INDEMNIFIED PARTIES DIRECT RESPONSIBILITY OR NEGLIGENCE IS A PATENTLY INCORRECT AND UNTRUE STATEMENT. SCHEDULE B ONLY REFERS TO THE LESSOR WHICH HAS BEEN IDENTIFIED AND IS ADMITTED BY DEFENDANT/ APPELLANT TO BE IDEALEASE SERVICES, INC., AN ILLINOIS CORPORATION.

A. Counsel submits that the argument that Idealease should have been covered by the 2000 RENTAL AGREEMENT AND INVOICE is without merit. The Court of Appeals determined, as has been said many times, that the issue of whether the 2000 Agreement was viable was a question of fact. What happened thereafter to bring the issue back to bear as to the 1999 Agreement was completely the fault of Defendant/Appellant. In the last section I noted certain omissions that were deemed to have been made by it in its Brief in support of other arguments which the Court of Appeals found supported the undeniable conclusion that Idealease of Flint was covered by the 1999 Agreement as it pertains to indemnity and insurance. The Court of Appeals made note of the argument of Plaintiff/Appellee in the body of its Brief. It stated at page 4:

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> "Plaintiff's next argument is that the grant of summary disposition against Idealease of Flint, Inc. ('Idealease of Flint'), was improper. Idealease of Flint contends it is entitled to indemnity and insurance under the terms of the 2000 rental agreement." (Emphasis provided).

There is no question in the Court of Appeals' mind as to the argument of the Plaintiff/Appellee but the Court of Appeals went further and indicated that the admissions of Defendant/Appellant supersede and overcome any questions of fact that might exist insofar as Idealease and the 2000 Agreement are concerned. On page 5 it states as follows:

> "Even if the rental agreement was not assented to by an authorized representative of defendant, defendant concedes that the national agreement is controlling on the issue of its duties owed to Idealease of Flint: 'Only the National Agreement governs'. Therefore, we will analyze the issues of insurance and indemnity under the national agreement as they pertain to Idealease of Flint."

Defendant/Appellant has had the tendency to take inconsistent positions in various arguments. This is a complicated case and its easy to do but the point is that it is not the proper thing to do. All the Court of Appeals did was take the word that was written by Defendant/Appellant and make a ruling based upon them.

B. The issue of the words of the contract have been abandoned according to the Court of Appeals and Defendant/Appellant must address the reason why it has not been abandoned before it may substantively argue anything based upon ambiguity.

C. Hills' Pet was the negligent party. Employing the concept of "ellipses", as to the wording of paragraph 10 of the Addendum is not a convincing argument.

Hills' Pet Nutrition was not only a negligent party, it was the last negligent party. It had this truck for a long time and its duty to inspect the vehicle was never undertaken.

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That means that for the almost three (3) weeks it was in its possession it did not fill the checklist out required by the State of Michigan or the Federal Government. It did not require each driver to fill out the checklist because this particular item, that is the cotter key supporting the nut that holds the steering arm together is a specific item listed on the checklist. We can say with complete confidence that this truck was never inspected by anybody as it was supposed to be for the period it was in their possession. Certainly this does not mean that Tri-County or Idealease would not have been held responsible. It does mean, however, that the negligence in this particular case was fractionalized into different acts committed by different people and Mr. Head was responsible himself. He was hurt unnecessarily and that is a grave misfortunate. Certainly there can be no legitimate claim that there was anything unfair about the indemnity agreement because Tri-County and Idealease were not going to be the only persons negligent in this case.

Defendant/Appellant reiterates its ellipses argument. An ellipses is a tool which adds words to a contract. The Court of Appeals was unreceptive to this argument. Furthermore Judge Zahra specifically wrote in page 2 of his Opinion that the ellipses application as argued should exist as to paragraph 10 of the Addendum was not a use consistent with the ellipses applications in the other paragraphs of the Addendum including 5f, 5n and 9b 1. Since Plaintiff/Appellee's argument in this section places tremendous emphasis on this particular argument, it cannot be sustained.

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RELIEF REQUESTED

Plaintiffs/Appellants pray that this Honorable Court affirm the Opinion of the Court of Appeal of October 25, 2005 and deny Defendant/Appellee's Application for Leave to Appeal.

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